FAIR POLITICAL PRACTICES COMMISSION

Memorandum

To: Chairman Randolph and Commissioners Blair, Downey, Huguenin and Remy

From: C. Scott Tocher, Senior Commission Counsel
Luisa Menchaca, General Counsel

Re: Adoption of Resolution Regarding Sections 84503 and 84506

Date: March 8, 2005

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Executive Summary

Shortly before the recent November statewide election, the state's Republican and Democratic parties, along with the Orange County Republican Party, sued the FPPC in federal district court, alleging that the advertising disclosure provisions of the Act that require on-publication identification of the two largest contributors over $50,000 were unconstitutional. (*California Democratic Party, California Republican Party, et al., v. Fair Political Practices Commission, et al.*, No. Civ-S-04-2144, E.D. Cal.) The primary ground of the complaint is based on a 2004 Ninth Circuit opinion (*American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979 ("*Heller*")) that struck down a Nevada statute that also required on-publication identification of donors.

The district court in the present case found, on the strength of the *Heller* decision, the plaintiffs likely would succeed in their suit against the Commission and issued a temporary injunction enjoining the Commission from enforcing the challenged provisions against the plaintiffs and similarly situated general purpose committees.

In light of controlling appellate authority and the holding of the district court in the current litigation, staff recommends the Commission adopt a resolution clarifying the Commission's enforcement policy with respect to Government Code sections 84503 and 84503 as they apply to general purpose ballot measure committees.

I. Sections 84503 and 84506.

> "**§ 84503. Disclosure; Advertisement For or Against Ballot Measures.**
>
> "(a) Any advertisement for or against any ballot measure shall include a disclosure statement identifying any person whose cumulative contributions are fifty thousand dollars ($50,000) or more.

> "(b) If there are more than two donors of fifty thousand dollars ($50,000) or more, the committee is only required to disclose the highest and second highest in that order. In the event that more than two donors meet this disclosure threshold at identical contribution levels, the highest and second highest shall be selected according to chronological sequence."
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> "**§ 84506. Independent Expenditures; Advertisements.**
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> "If the expenditure for a broadcast or mass mailing advertisement that expressly advocates the election or defeat of any candidate or any ballot measure is an independent expenditure, the committee, consistent with any disclosures required by Sections 84503 and 84504, shall include on the advertisement the names of the two persons making the largest contributions to the committee making the independent expenditure. If an acronym is used to specify any committee names required by this section, the names of any sponsoring organization of the committee shall be printed on print advertisements or spoken in broadcast advertisements. For the purposes of determining the two contributors to be disclosed, the contributions of each person to the committee making the independent expenditure during the one-year period before the election shall be aggregated."

Together, these statutes require on-publication identification of the two largest contributors to the committee making the expenditure for the political advertisement.

II. Summary of the Case and Procedural History.

On October 12, 2004, the California Republican Party, the California Democratic Party, and the Orange County Republican Party filed a Complaint in the Federal District Court seeking injunctive and declaratory relief from two "on-publication" provisions of the Act, sections 84503 and 84506, which require a committee paying for ballot measure advertisements to identify their two highest contributors of $50,000 or more. Prior to filing the complaint, the plaintiffs did not request the Commission to consider application of the statutes to them in light of the *Heller* decision. On October 20, 2004, plaintiffs amended their Complaint, and noticed a motion for preliminary injunction to be heard on October 26, 2004. The FPPC filed its Opposition to this motion on October 22, and Plaintiffs' Reply was filed and served on Monday, October 25. The matter was heard before the Honorable Frank C. Damrell, Jr. on October 26, 2004. The Attorney General's office represented the Commission.

On October 27, 2004, Judge Damrell granted Plaintiffs' motion and enjoined the Commission from enforcing these provisions against political party committees registered with the Secretary of State as general purpose committees. One of the key

arguments made by the plaintiffs was that requiring disclosure of certain contributors on the communication as "paid for by" or similar language was, in fact, misleading. The plaintiffs offered evidence that certain groups required to be identified in the parties' advertisements regarding measures on the November ballot in fact opposed the measures supported by the advertisements. At the hearing, the judge found significant that campaign reports required elsewhere in the Act show all the contributors, which allow members of the public to more fully determine donors' connections to a committee's efforts. On the other hand, the judge felt that the advertisement disclosure statutes challenged can be misleading when major donors do not support or oppose a political party ballot measure effort.

A key factor in determining whether to grant the preliminary injunction request is the likelihood of plaintiffs' success at trial. The court, in its decision, found that plaintiffs demonstrated "serious questions going to the merits of their claim" based on the *Heller* decision.

III. The *Heller* Decision.

In *Heller*, the Ninth Circuit applied strict scrutiny to strike down a Nevada statute requiring on-publication disclosure of parties responsible for any materials relating to an election of a candidate or ballot measure. In support of the disclosure requirements, the defendant in *Heller* proffered several governmental interests, including the need to provide information to voters regarding the identity of campaign donors. The Ninth Circuit rejected as "not sufficiently compelling" the government's interest of informing voters, finding that "the simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." (*Heller, supra,* 378 F.3d at 993.) In striking down Nevada's statute, the 9th Circuit's defining statements were: (1) "The constitutionally determinative distinction between on-publication identity disclosure requirements and after-the-fact reporting requirements has been noted and relied upon both by the Supreme Court and by this Circuit;" and (2) "The availability of the less speech-restrictive reporting and disclosure requirement confirms that a statute like the one here at issue cannot survive the applicable narrow tailoring standard." (*Id.*, at pp. 991, 995.)

In the instant matter, although the Commission attempted to distinguish the Nevada statute, the district court found the statutes did not satisfy constitutional safeguards as to general purpose committees in light of the existence of less intrusive campaign reporting statutes. Because California's scheme requires proscription "of the speech itself" unless it complies with certain criteria, the court found that the statutes suffered the same constitutional infirmity as in *Heller*.

Of particular significance in the context of general purpose committees is the point that the required disclosures may in some cases actually be misleading. General purpose committees, by their nature, may exist over many election cycles and receive contributions from donors of such a size that the donor may be disclosed on an

advertisement regarding an issue years later with which the donor has no affiliation or indeed may oppose. Such disclosure is arguably misleading and impossible to compel under *Heller*.

IV. Recommendation.

In light of the *Heller* and District Court decisions, staff recommends the Commission adopt a resolution specifying the Commission's policy with respect to application of sections 84503 and 84506 in the context of general purpose ballot measure committees. The attached draft resolution would indicate that these statutes would not be applied to such committees, in light of controlling appellate authority, unless such authority were overruled or otherwise rejected by a California court of appeal or the Supreme Court. Such a policy will help avert unnecessary expense of staff and other state resources defending piecemeal litigation building on the precedential authority already established.